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In the

# Supreme Court of the United States.

OCTOBER TERM, 1929.

NO. 12, ORIGINAL.

THE STATE OF CONNECTICUT,
COMPLAINANT.

*v.*

THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT.

## BRIEF OF MASSACHUSETTS, IN OPPOSITION TO

1. Motion for Leave to File Motion to Dismiss the Defendant's Answer;
2. Motion to Dismiss the Defendant's Answer;
3. Motion for Leave to File Motion to Strike Out Portions of the Defendant's Answer;
4. Motion to Strike Out Portions of the Defendant's Answer.

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In the

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OCTOBER TERM, 1929.

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No. 13, ORIGINAL.

THE STATE OF CONNECTICUT,
COMPLAINANT,

*v.*

THE COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT.

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## BRIEF OF THE DEFENDANT, THE COMMONWEALTH OF MASSACHUSETTS, IN OPPOSITION TO

1. Motion for Leave to File Motion to Dismiss the Defendant's Answer;
2. Motion to Dismiss the Defendant's Answer;
3. Motion for Leave to File Motion to Strike Out Portions of the Defendant's Answer;
4. Motion to Strike Out Portions of the Defendant's Answer.

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## STATEMENT OF THE CASE.

This is an original bill in equity filed by leave of court by the complainant, the State of Connecticut, seeking to prevent and enjoin the defendant, the Commonwealth of Massachusetts, from diverting—

(*a*) the flood waters of the Ware river,
(*b*) certain waters of the Swift river,

both of which streams are non-navigable tributaries of the Chicopee river, itself a non-navigable tributary of the Connecticut river, and are situated wholly within the geographical limits of Massachusetts. The purpose of the proposed diversion, authorized by two acts of the General Court of Massachusetts, is to provide a suitable supply of water for drinking and domestic use for the Metropolitan Area surrounding the City of Boston, which is now threatened with a serious water shortage (Answer, pp. 23-24). The Massachusetts legislation authorizing the project is found in Acts of 1926, c. 375, and Acts of 1927, c. 321 (Answer, pp. 33-77).

Connecticut, appearing not only as a proprietor of riparian lands (Bill, p. 6), but also as *parens patriae* (Bill, pp. 2, 6, 10, 13), alleges that the diversion will seriously impair navigation upon the Connecticut river (Bill, p. 10), that it will diminish the flow of water in the river sufficiently to cause damage to the health (Bill, pp. 8, 9, 11, 12), welfare, and property interests of Connecticut and her citizens, and that it will be a violation of the riparian rights (Bill, p. 7) of the State of Connecticut and of the citizens of that State, who can be represented as against another sovereign State of the Union only by the State as *parens patriae*.

Massachusetts in an answer to the bill, filed by leave of court, denies that any injury to navigation, to the State of Connecticut, or to the citizens of that State will result from the proposed diversion, and affirmatively alleges that compared to the total flow in the Connecticut river at the Connecticut–Massachusetts boundary the flow to be diverted is negligible and insignificant (Answer, pp. 1-27). [It appears from the bill (p. 4) that the total watershed of the Connecticut river is 11,300 square miles. The total watershed of the Ware river is alleged to be 221 square miles and that of the Swift river is set forth as 213 square miles (Bill, p. 5). It appears from the answer of Massachusetts, however, that the drainage area of the Ware river

above the point of partial diversion is only 98 square miles (Answer, par. 7, p. 9) and that the drainage area of the Swift river above the point of diversion is only 186 square miles (see Answer, par. 17, p. 18, and plan opposite p. 32; Amended Answer, Appendix "C," p. 27).] Massachusetts also sets up certain affirmative legal and equitable defenses (Answer, pp. 27-32), including—

(*a*) The existence of an emergency within Massachusetts constituting a justification for a reasonable use of the waters to be taken by the proposed diversion (Answer, pp. 27-28).

(*b*) The existence of an adequate remedy at law in the State of Connecticut and its citizens in the form of compensation for any injury caused to the State or its citizens (Answer, pp. 24-25, 28-29).

(*c*) The serious injury to the welfare of the citizens of Massachusetts, if the diversion is prohibited, compared to the negligible and trivial damage to Connecticut and its citizens possibly caused if the diversion is permitted, which should lead a court of equity to give substitutional relief rather than specific relief.

(*d*) The contention that the claim of Connecticut goes beyond a claim in behalf of the State in its true capacity as *parens patriae*.

(*e*) The contention that, so far as relief is sought for interference with navigation, the matter is one delegated under due constitutional authority by the Congress of the United States to the Secretary of War and his subordinates.

(*f*) The contention that the diversion is one which is *de minimis* and in all respects a reasonable use of the waters of the Swift and Ware rivers by Massachusetts.

(*g*) Laches.

*Connecticut's Unsuccessful Attempt to Join War Department Officials as Parties Respondent.*

At the last term of court the State of Connecticut requested leave of this Honorable Court to file a motion which—

1. Sought to join the Chief of Engineers, United States Army, and the Secretary of War as parties respondent in this equity case.

2. Sought to obtain an injunction against these officials of the War Department—

(*a*) prohibiting them from acting upon the then pending application for a determination of the effect of the proposed diversion from the Swift river upon the navigable capacity of the navigable portion of the Connecticut river.

(*b*) ordering them to revoke their previously announced determination that (with certain insubstantial and immaterial limitations) the proposed diversion from the Ware river would have no adverse effect upon the navigable capacity of the Connecticut river.

The motion was based on allegations—

1. That the Secretary of War and the Chief of Engineers had no jurisdiction to determine that the proposed diversions would have no adverse effect on the navigation of the Connecticut river.

2. That the determination in fact made by the War Department officials was erroneous.

On April 22, 1929, this Honorable Court refused leave to Connecticut to file this motion, 279 U.S. 821.

*Applications by Massachusetts to the War Department for Permission to Make the Proposed Diversions—Action thereon by the War Department.*

On November 30, 1927 (Amended Answer, par. 1, p. 6; Answer, p. 6; Appendices to Amended Answer, "B" and "C," pp. 12-32), the Metropolitan District Water Supply

Commission (acting at the suggestion of the Providence District Engineer of the War Department) filed formal application for permits to make the diversions contemplated under the Massachusetts legislation (Answer, Appendix "A," pp. 33-77). After public hearings and extended investigation, during which counsel and engineers for the State of Connecticut were heard at length, the War Department, upon recommendation of the Chief of Engineers and with the approval of the Secretary of War, determined—

(*a*) on March 14, 1928, that the proposed diversion from the Ware river "will have no adverse effect on the navigable capacity of the Connecticut River" (Amended Answer, p. 7; Appendix "B" thereto, p. 16), and announced that the War Department would interpose no objection to such proposed diversion, provided that it remained within stipulated limits substantially those of the Massachusetts Acts of 1926, chapter 375, section 4 (Answer, pp. 37-38);

(*b*) on May 11, 1929, that the proposed diversion from the Swift river [if kept within certain limits, set forth in the order of the Department; which limits will result in a modification of the diversion authorized by the Massachusetts Acts of 1927, chapter 321, section 1 (see Answer, pp. 48-50)] would not substantially alter or modify the condition or navigable capacity of the channel of the navigable portion of the Connecticut river (Amended Answer, p. 7; Appendix "C," p. 29), and announced that subject to the limitations stipulated the Department would interpose no objection to the proposed diversion.

War Department approval has thus been obtained for the whole Ware river diversion contemplated by the Massachusetts legislation, with trivial and immaterial modifications; and for very much the greater part of the Swift river diversion authorized by the Massachusetts legislation. Of course, while the War Department limitations remain in effect, they will, as a practical matter, control the terms

of the diversion in so far as they are inconsistent with the Massachusetts legislation.

*The Requested Amendments of the Answer.*

The action of the War Department did not take place until after the filing in March, 1928, of the original answer in these equity proceedings. Certain provisions of the answer require amendment in view of these recent events. The answer as amended contains the pertinent portions of the applications to the War Department and of the orders of that Department (Appendices "B" and "C"; Amended Answer, pp. 12 to 32).

## SUMMARY AND ANALYSIS OF THE PRESENT MOTIONS AND OF THE ARGUMENTS OF THE PARTIES.

*The Present Motions of the Complainant.*

The State of Connecticut now seeks leave to file—

(*a*) a motion to dismiss the defendant's answer.

(*b*) a motion to strike out certain portions of the defendant's answer.

## *THE CONNECTICUT MOTION TO DISMISS THE ANSWER.*

*Contentions of Connecticut in the Motion to Dismiss.*

The motion to dismiss the defendant's answer is based upon the following general contentions:

1. That it appears from the face of the defendant's answer that the proposed diversion of water from the Ware and Swift rivers is forbidden under the River and Harbor Act of March 3, 1899, §§ 9 and 10 (30 STAT. AT L. 1151; U.S.C., Tit. 33, §§ 401, 403)—

(*a*) since it is alleged that it appears in the answer that the consent of Congress has not been obtained for the erection of works in the *non*-navigable streams—the Swift and the Ware rivers (Mot. to Dismiss, pars. 2-9, pp. 5-8; see, however, argument, *infra*, pp. 16 to 39).

(*b*) since it is alleged that it appears in the answer that the work in these *non*-navigable streams has not been recommended by the Chief of Engineers and authorized by the Secretary of War or that plans for such work in these *non*-navigable streams have been submitted to the Chief of Engineers and approved by the Secretary of War (Mot. to Dismiss, pars. 3, 4, 6, 7, 9, pp. 6-8; see, however, argument, *infra*, pp. 28 to 29).

2. That it appears from the answer—

(*a*) That the Massachusetts legislation contains no authorization of the taking by eminent domain of the property (situated in Connecticut) of the State of Connecticut or of its citizens.

(*b*) That no sovereign entitled to take property in Connecticut by eminent domain has—

*i*) taken such property,

*ii*) or authorized its taking.

(Mot. to Dismiss, pars. 10-13, pp. 8-9; see, however, argument, *infra*, pp. 41 to 56.)

3. That it appears from the answer the proposed diversions are unlawful—

(*a*) under the riparian law both of Massachusetts and Connecticut (Mot. to Dismiss, par. 14, pp. 9-10; see, however, argument, *infra*, pp. 42 to 49).

(*b*) and cannot be made lawful—

*i*) by any act or authorization of the Massachusetts Legislature or of Congress,

*ii*) or by the exigency and emergency existing with respect to obtaining a suitable water supply for the Metropolitan Area in and about the City of Boston (Mot. to

Dismiss, pars. 15 and 16, pp. 10-11; see, however, argument, *infra*, pp. 49 to 56).

*Contentions of Massachusetts in Opposition to the Allowance of the Motion to Dismiss.*

Massachusetts contends that the answer (and the amendment thereto now sought) is sufficient in law to present a complete defense to the bill of complaint. By denial of allegations of fact contained in the bill of complaint and by affirmative allegations of fact (not as yet denied in any pleading filed by the State of Connecticut) a factual basis is laid for defenses, both legal and equitable, which, we contend, this Honorable Court should find to be adequate.

The answer (and the amendments which the Commonwealth of Massachusetts now seeks to make thereto) alleges, among others, the following facts:

1. The Massachusetts project (both as authorized by the Massachusetts legislation and as modified by the terms of the War Department orders—see Answer, Appendix "A," pp. 33-77; Amended Answer, Appendices "B" and "C," pp. 12 to 32) contemplates the erection of no works, dams, or structures in any navigable stream. The only structures contemplated are to be in the non-navigable Swift and Ware rivers (see Answer, par. 14, esp. p. 12; par. 17, esp. pp. 16-19; par. 19, p. 22; par. 20, pp. 23-24). It is the contention of Massachusetts—

(*a*) That no affirmative authorization by Act of Congress is necessary for the erection of works in non-navigable streams, even if they are tributaries of navigable waters of the United States.

(*b*) That the provisions of section 9 of the River and Harbor Act are not applicable to the erection of structures in non-navigable streams—so that it is not necessary for Massachusetts to submit plans for the contemplated structures to any Federal official or department nor need the

approval of such structures by any Federal official or department be obtained (see argument, *infra*, pp. 28 to 30).

2. The Massachusetts project (as originally authorized by the Legislature and as modified by the War Department orders) will as a matter of fact—

(*a*) have no adverse effect upon the navigable capacity of the Connecticut river (Answer, par. 11, p. 10; par. 13, p. 11; par. 14, pp. 11-13; par. 16, pp. 13-15; par. 17, pp. 15-20; par. 18, pp. 20-22; Amended Answer, pars. 1, 2, 3).

(*b*) result in only a reasonable use of the waters arising in Massachusetts, which flow across the Connecticut–Massachusetts boundary, for the purpose of relieving a real emergency existing in Boston (see, *e.g.*, Answer, par. 17, esp. p. 20).

(*c*) have no tendency to injure the health, safety, welfare, or property of the State of Connecticut or its inhabitants (see, *e.g.*, Answer, par. 16, esp. p. 15).

It is the contention of Massachusetts that these facts, if proved, taken together with the findings and orders of the War Department (Amended Answer, Appendices "B" and "C," pp. 12 to 32) indicate—

(*a*) That there is no violation by Massachusetts of the provisions of section 10 of the River and Harbor Act of 1899, inasmuch as the diversion (either as originally contemplated or as modified by the War Department orders) will cause no appreciable or unreasonable alteration of the navigable capacity of the Connecticut river (see argument, *infra*, pp. 16 to 41).

(*b*) That the contemplated use by Massachusetts of the waters of the Connecticut river watershed is entirely proper and involves no taking of property situated in Connecticut; not only because of the principle of equitable division of waters of interstate streams as between equally sovereign States (see, *e.g.*, *Kansas* v. *Colorado*, 206 U.S. 46, 100; see argument, *infra*, pp. 49 to 56); but also by reason of

the principle of reasonable user as between riparian owners, which is in force both in Connecticut and in Massachusetts (see Answer, par. 17, esp. p. 20; see argument, *infra*, pp. 42 to 49).

(*c*) That every consideration of equity and of the principles of law governing interstate relations and disputes requires that Massachusetts be permitted to make the diversion contemplated without interference, at least so long as the terms of the orders of the War Department (see Amended Answer, Appendices "B" and "C," pp. 12 to 32) are not disregarded (see argument, *infra*, pp. 41 to 56).

In addition to the above contentions based upon the issues of fact raised by the allegations of fact contained in the pleadings, Massachusetts contends that this Honorable Court in its discretion ought to deny the motion to dismiss the defendant's answer (and the motion to strike out portions of the answer) until such time as it has before it for consideration definite findings of fact by a special master based on evidence heard by him. This Honorable Court, in adjudicating the issues here in dispute, is sitting as a *quasi*-international court, and it should have the benefit of a full knowledge of the factual situation before deciding any of the issues. Such procedure, we contend, would be in accordance with the usual practice of this Court (see, *e.g.*, *Kansas* v. *Colorado*, 185 U.S. 125, 146-147; *id.* 206 U.S. 46, 105; see argument, *infra*, pp. 40 to 41, 55 to 58).

## *THE CONNECTICUT MOTION TO STRIKE OUT CERTAIN PORTIONS OF THE MASSACHUSETTS ANSWER.*

The motion to strike out is designed to eliminate from the answer filed by Massachusetts allegations of fact upon which are based certain legal and equitable defenses which Connecticut deems to be insufficient in law. Roughly, the

motion may be said to be aimed at the following groups of allegations of fact in the answer:

1. Allegations that Connecticut will not be materially damaged by the diversion, but, on the contrary, will be considerably benefited by the mitigation of the severity of floods in the river; allegations that the effect of the diversion will not be sufficiently appreciable to be capable of measurement at the Massachusetts–Connecticut boundary (Mot. to Strike Out, pars. 1, 2, 7, 10, pp. 5-8, 17-20, 27-29).

2. Allegations that Boston and the Metropolitan District about that city are confronted with a serious emergency; allegations of the expenditure to meet that emergency (Mot. to Strike Out, pars. 3, 5, pp. 8-12, 14).

3. Allegations that an adequate remedy at law exists by which Connecticut and its citizens can recover for any incidental damage possibly caused by the diversion (Mot. to Strike Out, par. 6, pp. 14-17).

4. Allegations that the proposed diversions will not in fact obstruct the navigability or the navigable capacity of the Connecticut river; allegations that the protection of the navigability of the navigable waters of the United States is a duty of Congress (and by delegation of the administrative power of Congress, a duty of the Secretary of War, the Chief of Engineers, and of the War Department) and that the issue of the effect of the proposed diversion (as modified by the War Department orders) upon navigability is not open in these proceedings (Mot. to Strike Out, par. 8, pp. 20-24).

5. Allegations that the proposed diversion (both as originally contemplated and as modified by the War Department orders) is in fact a proper exercise of the sovereign right of Massachusetts to make a reasonable use of the waters of the Connecticut river valley watershed (particularly those waters arising in Massachusetts) within the principle of the equitable division of the waters of inter-

state rivers as between States, subject only to the superior rights delegated under the Constitution to the Federal Government (Mot. to Strike Out, pars. 9, 10, 12, pp. 24-26, 28, 30).

6. Allegations that Connecticut is in fact guilty of laches (Mot. to Strike Out, par. 4, pp. 12-14).

7. Allegations that the sewage content of the waters of the Connecticut river at the point where the river passes the Connecticut–Massachusetts boundary could be greatly increased without—

(*a*) making an unreasonable riparian use of the waters of the river.

(*b*) causing any menace or damage to the health, safety, welfare, or property of the State of Connecticut or of its inhabitants (Mot. to Strike Out, par. 11, pp. 29-30).

*Connecticut's Contentions of Law upon the Motion to Strike Out.*

Connecticut in substance makes contentions of law—

1. That the right of Massachusetts under any conceivable circumstances is absolutely limited to a use of the water of an interstate stream without any diminution as it flows through the State; that the quality, the quantity, and the time and rate of flow cannot be varied by any act of Massachusetts. This principle, Connecticut asserts, should be enforced—

(*a*) regardless of the fundamental interests of the health, welfare, and safety of the whole people of Massachusetts.

(*b*) regardless of any principle of equitable division of the waters of interstate streams as between equal *quasi*-sovereign States.

(*c*) regardless of any necessity or emergency existing in Massachusetts.

(*d*) regardless of the fact that the effect of the contemplated interference with the flow of the Connecticut river is—

*i*) so small as to be incapable of measurement at the Massachusetts–Connecticut boundary.

*ii*) so small as to constitute (within the limits of the War Department orders) no interference with navigation upon the Connecticut river.

*iii*) so small as to cause no damage whatsoever to the State of Connecticut or the citizens of that State.

(*e*) regardless of any equitable principles of comparative necessity and damage or of substitutional rather than specific relief based upon the circumstances of a particular case (see Mot. to Strike Out, pp. 6, 8, 11, 16-17, 20, 28-29, 30).

(*f*) regardless of any principle of priority of right to water based on the degree of public interest in the particular use as compared with the public interest in any other potential or actual use of the same water.

2. That under the terms of sections 9 and 10 of the River and Harbor Act of 1899 (see *supra*, p. 6; *infra*, pp. 16-17) Massachusetts has not taken the proper steps to obtain an authorization from the War Department and from Congress, and that the War Department has no power to grant such authorization (Mot. to Strike Out, pp. 23-24). These contentions of law are in substance the same as are made generally upon the issue of navigability in the motion to dismiss the defendant's answer (see *supra*, pp. 6 to 7).

*The Contentions of Law made by Massachusetts in Opposition to the Allowance of Leave to File and to the Allowance of the Motion to Strike Out Portions of the Answer.*

Generally speaking, the contentions of Massachusetts in opposition to the motion to strike out are the same as the contentions in opposition to the motion to dismiss (see *supra*, pp. 8 to 10). Massachusetts contends that the particular portions of the answer sought to be eliminated

contain allegations of fact which, if duly supported by evidence, prove—

1. That the contemplated diversion is to be accomplished by structures placed in the waters of only *non*-navigable streams; and therefore not within the jurisdiction of the War Department.

2. That the contemplated diversion (especially as modified by the War Department orders) has no tendency to obstruct or injure the navigable capacity of the Connecticut river.

3. That the contemplated diversion will cause in fact no damage to the health, welfare, safety, or property of the State of Connecticut or of its citizens.

4. That, if the contemplated diversion is not permitted (at least within the limits approved by the War Department), serious and irreparable damage will be caused to the Metropolitan Area about and including Boston.

5. That the contemplated diversion is in fact so small as to constitute no appreciable or unreasonable interference with the flow of the Connecticut river at the point where it enters the State of Connecticut.

Upon these facts as alleged (and subject to proof thereof), Massachusetts contends that the defendant should be allowed to present evidence and that a court of equity should deny relief to Connecticut, because—

1. As a matter of law and of fact the Massachusetts project does not contemplate the creation of any forbidden or unreasonable obstruction to the navigable capacity of the Connecticut river and in view of the orders of the War Department (set out in Appendices "B" and "C," Amended Answer, pp. 12 to 32) it appears—

(*a*) that Massachusetts is erecting no unauthorized structure in any navigable water of the United States.

(*b*) that the appropriate officials of the War Department, acting within the proper scope of their authority, have found that the proposed diversion, if kept within

proper limits (which, subject to future modifications, the power to make which is duly reserved by that Department, have for the time being been determined and fixed by that Department), will not interfere with navigation.

2. As a matter of law Massachusetts is proposing to take only such portion of the flow of the Connecticut river as—

(*a*) is proper under the principle of the equitable division of the waters of interstate streams as between States.

(*b*) is proper under the principle of reasonable user as between riparian owners—the only riparian owners concerned in this case being the State of Connecticut and the Commonwealth of Massachusetts in their *quasi*-sovereign capacities.

(*c*) would give rise to no judicial relief under any circumstances under the principle *de minimis non curat lex*.

3. As a matter of the adjustment of interstate controversies under the power committed to this Honorable Court by the Constitution of the United States (Article III, sections 1 and 2) in accordance with principles of equity, of international law, and of practical fairness and necessity, this Court should—

(*a*) determine the facts before determining the law applicable to the case and should commit this case to a special master for the determination of all the pertinent facts.

(*b*) should then weigh the urgent necessity of Massachusetts against the trivial and inconsequential damage (if any) to Connecticut and frame a decree which is the considered judicial determination of the proper balance of the interests here in issue.

## POINTS AND AUTHORITIES.

### I.

THE ACTION OF THE SECRETARY OF WAR AND THE CHIEF OF ENGINEERS UPON THE APPLICATIONS FOR THE APPROVAL OF THE CONTEMPLATED DIVERSIONS CONSTITUTED A PROPER PERFORMANCE OF THE DUTIES DELEGATED TO THEM BY THE ACT OF CONGRESS OF MARCH 3, 1899. THAT ACTION CONSTITUTES AN AUTHORIZATION OF THE DIVERSION (WITHIN THE LIMITS SPECIFIED IN THE WAR DEPARTMENT ORDERS), SO FAR AS NAVIGATION IS CONCERNED, AND FORECLOSES ANY CONTENTION OF CONNECTICUT THAT THE DIVERSION WILL INJURE NAVIGATION, IN THE ABSENCE OF PROOF OF BAD FAITH.

*A. The Duty of Determining whether Any Given Diversion of Water, which if Not Diverted will Flow into a Navigable Stream, will Constitute or Cause an Obstruction of the Navigable Capacity of that Stream Devolves upon the Secretary of War and the Chief of Engineers under the Act of March 3, 1899. No Direct Action by Congress is Necessary.*

Sections 9 and 10 of the Act of March 3, 1899, 30 STAT. AT L. 1151 (U.S. Code, Tit. 33, §§ 401, 403), read as follows:

> "SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navi-

gable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner *to alter or modify the* course, location, condition, or *capacity of*, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, *or of the channel of any navigable water of the United States*, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." (Italics ours.)

*The Wisconsin Case.*

The precise nature of the authority and duty delegated by Congress in these sections was recently considered by this Honorable Court in—

*Wisconsin* v. *Illinois and Sanitary District*, 278 U.S. 367, 412-413—

where it was said:

> "The policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890, c. 907; 26 Stat. 454, 455. Sections 9 and 10 were the rearranged result of the provisions of Sections 7 and 10 of the Act of 1890. A new classification was made in Sections 9 and 10 of the Act of 1899, and substituted for Section 10 of the Act of 1890. The latter provided that the creation of any obstruction to navigable capacity was prohibited, unless 'affirmatively authorized by law' and this was changed so as to read 'affirmatively authorized by Congress.' The change in the words of the first clause of Section 10 was intended to make mere State authorization inadequate. *Sanitary District* v. *United States*, 266 U. S. 405, 429; *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211. It was not intended to override the authority of the State to put its veto upon the placing of obstructing structures in navigable waters within a State and both State and Federal approval were made necessary in such case. *Cummings* v. *Chicago*, 188 U. S. 410. The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the

Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. *We do not think this was intended.* [Italics ours.] The Supreme Court of Maine in *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.

"The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction."

*Contemporary Construction of Section 10.*

The Court (at p. 413) then adverts to and approves the contemporary construction of section 10 by the War Department, especially as revealed by the Opinion of the Acting Attorney General to the Secretary of War (February 13, 1925), 34 Op. Atty. Gen. 410, 416, where the Acting Attorney General says:

"In my opinion Congress thus intended to delegate to the Chief of Engineers and the Secretary of War an administrative authority to determine a fact; and if they were of opinion that the use of navigable waters in a certain case was not such an impairment of their navigability as to require the prohibition of Congress, then the construction was 'affirmatively authorized by Congress,' because the administrative agency to which Congress had delegated the ascertainment of the facts had found the fact to be that such use was not for the time being an impairment of navigable capacity such as Congress intended to prohibit.

"I am informed that for a long period of years it has been the practice of the War Department to issue permits under section 10 of the Act of March 3, 1899, without requiring that the particular project be first authorized by special Act of Congress, and that was the policy of the War Department in the specific case of the Sanitary District of Chicago."

The following language of the opinion in *Wisconsin v. Illinois and Sanitary District* shows that the Court clearly had in mind the precise nature of the determination of fact thus left by Congress to the Secretary of War and to the Chief of Engineers (at p. 414):

"But it is said the construction thus favored would constitute it a delegation by Congress of legislative power and invalid. We do not think so. The determination of the amount that could be safely taken from the Lake is one that is shown by the evidence to be a peculiarly expert question. It is such a question as this that is naturally within the executive function that can be deputed by Congress. . . .

"The construction of Section 10 of the Act of March 3, 1899, was settled by this Court in the decision of the first Chicago Drainage Canal case in 266 U. S. 405,

429. The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and validly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so."

*Summary of the Wisconsin Case.*

Such is this Court's most recent construction of the power and duty confided to the Secretary of War and to the Chief of Engineers by section 10. Briefly, it may be summarized:

1. Congress, by section 10, has declared its decision that no unreasonable obstruction to navigable capacity shall be permitted unless Congress has affirmatively authorized it either directly or through the War Department.

2. Actual assent by Congress itself is necessary to projects covered by section 9. [In the case at bar it appears from the answer (p. 18) that the only dam or other storage reservoir to be constructed by Massachusetts as part of the project will be in the valley of the Swift river, which is in no sense a navigable water of the United States. The Connecticut river itself is not alleged to be navigable above Springfield (Bill, par. 6, p. 4). There is obviously no necessity of action by Congress itself under section 9 in order that approval of the erection of a reservoir in the valley of the Swift river may be obtained.]

3. Congress, by section 10, has delegated to the Secretary of War and to the Chief of Engineers the duty of determining whether any other project (having the necessary or probable result of doing one of the acts mentioned in the second and third clauses of section 10) is reasonable or unreasonable so far as concerns the public interest in the

maintenance of navigation for the protection of interstate and foreign commerce. A determination that a project is reasonable constitutes an affirmative authorization by Congress.

[We submit that it cannot successfully be maintained that the authority given by the second and third clauses of section 10 to the Secretary of War and to the Chief of Engineers does not include the power to determine the propriety of diversions from non-navigable tributaries of navigable waters. The third clause of section 10 (see *supra*, p. 17) reads, in part:

> ["And it shall not be lawful . . . in any manner to alter or modify the . . . capacity . . . of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

[These words are broad and inclusive in meaning and they have been liberally construed to include affecting by diversions the navigable capacity of a navigable water, as in the *Chicago Drainage Canal* cases. (See 34 Op. Atty. Gen. 410, 416.) It is obvious that a diversion from a non-navigable tributary of a navigable water may have fully as great an effect upon the navigable capacity of that water as a direct diversion from that water itself.

> [*United States* v. *Rio Grande &c. Co.*, 174 U.S. 690, 708.

[The purpose of Congress in making the prohibition contained in the first clause of section 10 would require the Secretary's authorization not only of a direct diversion from a navigable water but of an indirect diversion as well.]

*Standards of Administrative Action by the Secretary of War.*

The case of *Wisconsin* v. *Illinois* further defines the standards under which the Secretary and the Chief of Engineers must act in granting or withholding approval under section 10. We contend that these standards may be summarized so far as they affect diversions of water which otherwise would augment navigable waters.

(*a*) Diversions which *unreasonably* diminish the navigable capacity of navigable waters can only be authorized in furtherance of the protection and improvement of navigation.

(*b*) "The normal duty of the Secretary of War under Section 10 . . . is to maintain the navigable capacity of" (at p. 417) existing navigable waters rather than to sacrifice their capacity by diversions.

(*c*) There are certain projects having no relation to the improvement of navigation, but within the terms of the second and third clauses of section 10. If the Chief of Engineers recommends to the Secretary of War that such a project be approved on the ground that it will have no unreasonable adverse effect upon the navigable capacity of any stream, the Secretary acts within the scope of section 10 in permitting the project to be carried into effect (see *Wisconsin* v. *Illinois*, *supra*, at pp. 412 to 413; see *supra*, pp. 18-19). In approving such projects the standard upon which the Secretary's determination is based is the effect of the proposed project upon existing navigable capacity.

*Analysis of War Department Permits in Drainage Cases.*

The facts in the *Chicago Drainage* cases show that the War Department had in those cases consistently recognized the three principles of action just outlined. This is apparent from the action of successive Secretaries upon

applications by the Sanitary District for approval of diversions. The permits granted fall into two groups:

*1. Determinations that proposed diversions would have no adverse effect on navigation.*

It appears from the opinion (p. 404 *et seq.*) that the Sanitary District had in 1896, 1897, 1898, 1899, 1901, and 1903 obtained permits from the Secretary of War to divert water through the Sanitary Canal at a maximum rate under no permit greatly in excess of 4167 cubic feet per second (250,000 cu. ft. per min.). These permits were granted for a purpose clearly not very materially in aid of navigation, apparently upon the theory that such a diversion would not have any unreasonable adverse effect upon existing navigable capacity (with the possible exception of the permit of January 17, 1903, allowing a temporary additional diversion for the purpose of removing sewage deposit along the shores of a navigable water—see Special Master's Report, *Wisconsin* v. *Illinois*, p. 43). All of the permits above mentioned by their terms (see Special Master's Report, *supra*, pp. 34 to 43) show a zealous desire on the part of the Secretary to preserve existing navigable capacity, at the same time permitting such diversions as would not cause an obstruction to existing navigable capacity. In 1907 and in 1913 (see Special Master's Report, pp. 48, 60-66), in consistent pursuance of this policy of the Department, applications for further diversions were refused by the Secretary on the ground that they would impair the navigable capacity of waters already used for navigation. In *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 429, the whole course of action by the successive Secretaries was comprehensively reviewed, and not only by the language of the decision, but also by the result of it, the *rationale* of their construction of section 10 was approved (see especially p. 429) by this Court.

*2. Temporary permit in aid of navigation.*

The other type of permit considered in the case of *Wisconsin* v. *Illinois*, *supra*, was the temporary permit issued in 1925 (see Special Master's Report, p. 73), after the defendants in the *Sanitary District* case (266 U.S. 405) had been enjoined from diverting more than the amount actually and affirmatively permitted by the Secretary of War. The temporary permit unquestionably authorized a diversion which, if allowed to continue, might seriously damage the existing navigable capacity of the Great Lakes. It was conditioned upon removal by the Sanitary District of the cause of the excessive diversion by the construction of sewage disposal works. It rested for its validity, not upon the ground that the diversion would cause no injury to navigable capacity, but upon the ground that the diversion was affirmatively necessary to protect navigation in Chicago harbor from the deleterious effect of the sudden deposit of sewage inevitable if the preëxisting excess diversion were to be suddenly curtailed. Such a permit is in its essence separate and apart from a permit of the type granted earlier in the history of the Chicago diversions. The 1925 permit, though temporary in character, rested on the affirmative necessity of action to protect navigation; the earlier permits, like those applied for in the case at bar, were little more than evidence of a determination by the Secretary of War, acting in accordance with his duty under section 10, that the diversions authorized would not in fact impair the navigable capacity of existing waterways. This Court, upon a bill in equity brought by States actually and substantially injured by the diversion, recognized that it was inequitable that the Sanitary District should create by its own wrong a situation which gave validity to a permit from which the District received great benefit (see opinion, *Wisconsin* v. *Illinois*, *supra*, pp. 418, 420). It therefore made provision for a decree which would bring about as rapidly as possible a restoration of the preëxisting

navigable capacity of the Lakes without causing undue suffering and hardship to the people of Chicago; thus virtually doing precisely what the Secretary of War was endeavoring to do by the conditions imposed in the 1925 temporary permit.

The net result of the case of *Wisconsin* v. *Illinois* would seem to be, briefly:

1. To sustain the jurisdiction of the Secretary of War to make the determinations required of him by section 10 both—

(*a*) as to waiving objections, so far as public interest in navigation is concerned, to diversions which do not unreasonably interfere with existing navigable capacity, and—

(*b*) as to the necessity of action affirmatively in aid of navigation.

2. To protect those States, having an interest in the maintenance of navigation, in their enjoyment of previously existing navigable capacity—

(*a*) by enjoining unauthorized diversions;

(*b*) by treating as unauthorized diversions diversions originally proper (as not affecting navigation) which have been exceeded, thus creating an obstruction to navigable capacity which can be removed only by a cessation of both authorized and unauthorized diversions.

The case of *Wisconsin* v. *Illinois* has been examined here at such length only because the interpretation therein contained of section 10 is the most recent and most comprehensive yet undertaken by this Court, and we contend that the *Wisconsin* case in no way casts doubt upon the conclusion reached in the earlier case of *Sanitary District* v. *United States*, 266 U.S. 405. That case treated as duly authorized by Congress such diversions as were approved by the Secretary of War and the Chief of Engineers because of a determination that such diversions would have no adverse

effect on navigable capacity. This was the view of *Sanitary District* v. *United States*, taken by this Court in *Wisconsin* v. *Illinois*, *supra*, at page 414 (see *supra*, pp. 20-21).

*War Department Action in Present Case.*

The action of the War Department upon the Massachusetts applications for approval of the contemplated diversions has been fully set out above (see *supra*, pp. 4 to 6; see Amended Answer, pp. 5-8; Appendices "B" and "C," pp. 12 to 32). It must be taken as true (since there is no allegation in the complaint to the contrary) that the appropriate officials of the War Department—

1. Acted in good faith.

2. Made a reasonable, proper, and warranted finding of fact that the proposed diversion from the Ware river would have no adverse effect on navigation.

3. Made a similar finding of fact with respect to the Swift diversion (subject to the limitations contained in the finding. See Amended Answer, Appendix "C," pp. 19 to 32).

4. Acted in all respects within the scope of their duty under section 10, which was—

(*a*) to approve or waive objection to the project, though for a purpose not connected with the improvement of navigation, if the execution of the project would have no unreasonable adverse effect on navigation;

(*b*) to withhold approval if the navigable capacity of existing waterways would be unreasonably impaired by the execution of the project.

It is, of course, clearly unnecessary for the Secretary to deny permission for a present diversion which is not harmful to navigation, merely because at some future date a project in aid of navigation may require, for purposes of storage for use in seasons of low water, the water now proposed to be diverted. The Secretary is bound to look only

at the situation as it exists at the time of granting the application.

> *Louisville Bridge Co.* v. *United States*, 242 U.S. 409, 425.

This Court will not entertain an original bill seeking relief for a fanciful injury conceivably to be suffered in the distant future.

> *New York* v. *Illinois*, 274 U.S. 488, 490.
> *Florida* v. *Mellon*, 273 U.S. 12, 18.

*No War Department Permit Needed for Structures in Non-Navigable Tributaries of Navigable Streams.*

A large portion of the contentions upon the issue of navigability in the present Connecticut motions rests upon some theory that Massachusetts requires the permission of the War Department under sections 9 and 10 of the Act of March 3, 1899, before erecting a dam in the valley of the *non*-navigable Swift river (see, *e.g.*, Mot. to Dismiss, pars. 3, 4, 6, 7, 9, pp. 6-8; Mot. to Strike Out, par. 8, esp. pp. 23-24). Such a contention, pushed to its logical conclusion, would require the consent of Congress before the smallest mill dam could be built on the smallest stream, if that stream flowed eventually into a navigable river. This contention of Connecticut is, we submit, entirely frivolous. The plain words of section 9 ("any . . . dam, dike . . . in any . . . *navigable river or other navigable water*"—see *supra*, p. 16) and of section 10 ("or other structure in any . . . navigable river, or other water of the United States" —see *supra*, p. 17) indicate beyond any doubt that Congress intended to regulate only the erection of structures actually placed in the *navigable* portions of *navigable* streams—and in no way intended to do what it has probably no constitutional power to do, *i.e.*, to regulate the construction of works in non-navigable streams. If there were

any room for doubt as to the meaning of sections 9 and 10, we submit that this Court should be astute to adopt (as between a statutory construction which raises strong doubts as to the constitutionality of an act of Congress and another construction which renders the statute unquestionably valid) the construction which leaves no room for any holding or argument that the legislative department has exceeded its powers.

> *Richmond Screw Anchor Company* v. *United States*, 275 U.S. 331, 346.
> *Blodgett* v. *Holden*, 275 U.S. 142, 148.

This Court has made it clear that section 9 would be construed to apply only to the specific structures therein mentioned.

> *Wisconsin* v. *Illinois*, 278 U.S. 367, 412-413 (quoted *supra*, p. 18).

No structures in non-navigable streams are mentioned in section 9, so it is certain that no authorization by act of Congress is necessary before Massachusetts or any riparian owner can build a dam in the non-navigable Swift river. We submit that it is equally certain that the second clause of section 10 applies only to structures actually placed in navigable waters of the United States and that the section does not apply to any structure in a non-navigable stream. It is, of course, true that the construction of a dam in a non-navigable stream in and of itself has no necessary effect upon the navigable capacity of any navigable water into which the non-navigable stream may flow. For that reason there is no basis for Congressional control of the *erection* of dams in *non*-navigable waters. The *use* of such dams in such a way as to create an obstruction to the navigable capacity of any navigable water of the United States is, of course, subject to the Congressional control, which has been delegated by section 10 to the Secretary of War and to the Chief of Engineers.

***B. The Determinations of the Secretary of War upon the Contemplated Swift and Ware Diversions Constitute a Valid Authorization of those Diversions so Far as the Question of Navigability is Concerned.***

*1. The correctness of the Secretary's determination cannot be reviewed, in the absence of proof of bad faith or failure to comply with applicable procedural requirements.*

This Court has always held that Congress had full constitutional authority to decide what things constituted obstructions to navigation and what things did not. The cases on the subject are comprehensively reviewed in the Report of the Special Master in the case of *Wisconsin* v. *Illinois and Sanitary District* (see pp. 161 to 165). The special master summarizes his conclusions (at p. 164):

> "The question whether such an abstraction should be altogether prohibited, or the extent to which it should be permitted with regard to the interests of navigation, when and in what circumstances and in what amount a diversion of water from the lake would constitute an obstruction to navigation, are questions within the power of Congress to decide in the exercise of its control over navigable waters for the purposes of navigation. When these questions have been determined by Congress, or under its authority validly conferred, they are not open to reconsideration by the court."

When the *Wisconsin* case (278 U.S. 367) was decided by this Court, it cut under the rule of law laid down by the master, for, as we have indicated above, this Court decided, as a matter of equity between two parties (properly before the Court acting within its original jurisdiction), that one party could not be allowed, by committing a nuisance, to create a situation which made necessary a remedial permit from the Secretary of War (see *supra*, pp. 25-26). The

Secretary in 1925 was faced with a situation of fact and upon that situation made a valid determination in the interests of navigation. This Court in no sense disapproved the propriety of that determination, but held it proper. The Court, however, did order that the Sanitary District stop its inequitable conduct so that the Secretary would not be forced to a determination which would result in an impairment of existing navigable capacity on the Lakes. The finality of the Secretary's determination upon a given set of facts was, we submit, in no degree questioned, and the language of the *Wisconsin* case (especially at pp. 413-414) gives every indication that this Court approved the conclusion of the special master following earlier decisions of this Court:

1. That Congress could itself finally determine whether a diversion would obstruct navigable capacity.

2. That Congress could delegate that duty to the Secretary of War and his staff of expert subordinates, who were particularly fitted to make the determination of fact.

3. That the determination made in good faith was not subject to direct judicial review.

The earlier cases raise the problem more directly and uniformly hold that where the Secretary is acting to aid navigation, or is indicating that there is no injury to the Federal interest in the maintenance of navigation involved in a particular project, his determinations of fact have always been treated as final, by this Court, and as not subject to judicial review.

*Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 430, as affecting s.c. 13 How. 518, 625.

*South Carolina* v. *Georgia*, 93 U.S. 4, 12.

*Miller* v. *Mayor*, 109 U.S. 385, 393, 395.

*Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 195.

*Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 635, and cases there cited.

*United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 64-65.

*Louisville Bridge Co.* v. *United States*, 242 U.S. 409.

*Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U.S. 205, 210, and cases cited.

The *Monongahela Bridge Co.* case is explicit upon the question. The Secretary of War (the present Chief Justice), acting under section 18 of the Act of March 3, 1899 (30 STAT. AT L. 1151, 1153, U.S. Code, Tit. 33, § 502), had ordered that the bridge there in question be so altered as to render it no longer an obstruction to navigation. A criminal information was filed stating non-compliance by the defendant company with the terms of the Secretary's order and the jury returned a verdict of guilty. By a motion in arrest of judgment the constitutionality of the Act of 1899 was contested. The motion was denied and a fine imposed. This Court upon writ of error held:

1. That the Act of March 3, 1899, laid down a (at p. 192) "general rule, applicable to all navigable waters, that free navigation should not be hampered by unreasonable obstructions . . . ; that . . . Congress charged the Secretary of War with the duty of ascertaining, in each case, . . . whether the particular bridge came within the general rule prescribed; that any other method was impracticable in view of the vast and varied interests of the Nation requiring legislation . . ."

2. That the Secretary must not act in arbitrary fashion, but must give notice and an opportunity to be heard to parties interested, and must allow a reasonable time for alterations. (Parenthetically, it may be here pointed out that there is no allegation in the bill, or in the pending motions in the case at bar, that the State of Connecticut has

not had full opportunity to present all her claims. Allegations which affirmatively show not only a comprehensive study of the whole situation by the War Department, but also that Connecticut has been heard at length by the Secretary and his subordinates at all stages of the proceedings are contained in the Amended Answer, p. 7; see also Appendices "B" and "C," pp. 12 to 32).

3. That the decision of the Secretary, made in good faith, is final to all intents and purposes and that (at p. 195)—

> "It was not for the jury to weigh the evidence and determine according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress."

*2. Congress having undertaken a comprehensive scheme for the protection of navigation, the whole subject-matter, so far as within the scope of existing Congressional regulation, is the exclusive concern of Congress and of the War Department, by delegation of the power of Congress.*

It has frequently been held that, by the provisions of the Act of September 19, 1890 (26 STAT. AT L. 453, 454), and by the acts amending the 1890 act, Congress has assumed jurisdiction of the subject of obstructions to navigation in accordance with a policy of direct and general control over the navigable waters of the United States.

> *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U.S. 205, 207-208.
> *Sanitary District* v. *United States*, 266 U.S. 405, 425-426, 428-429.

The 1890 act and the 1899 amendments (*supra*, pp. 17-18) are an exercise of the power to keep open and free from any obstructions to their navigation all of the navigable waters within the United States which are accessible from a State other than those States in which they lie.

> *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62-65, and cases cited.
> See *Gilman* v. *Philadelphia*, 3 Wall. 713, 724.
> *Gibson* v. *United States*, 166 U.S. 269, 271.

In the *Chandler-Dunbar* case, *supra*, at p. 64, it was said:

> "So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

"In *Pennsylvania* v. *Wheeling Bridge Company*, 18 How. 421, 430, this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

" 'Although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its perservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government.' "

The finality of the decision of the War Department officials upon the issue of obstruction, so far as direct attack upon that decision is concerned, is definitely settled by the opinions of this Honorable Court, cited *supra*, pp. 31 to 32. We contend, however, that it is equally well settled that the decision of the Department is fully as final when attacked collaterally in proceedings to which neither the Department nor the United States is a party. When the waiver or permit of the War Department is relied upon as an authorization or defense, it is, we submit, conclusive of the issue of obstruction or injury to navigation.

This is certainly true where the existence of an obstruction to navigation becomes of importance in litigation as between private parties.

> *Southern Pacific Co.* v. *Olympian Dredging Co.*, 260 U.S. 205, 207-208, 209-210, and cases cited.

We contend that no different rule applies when the determination of the War Department that no obstruction to navigation exists in any particular instance is raised in the course of litigation before this Honorable Court, within its original jurisdiction.

In *Kansas* v. *Colorado*, 206 U.S. 46, 85 *et seq.*, this Honorable Court, in considering the nature of its original jurisdiction as between States, took a distinction as between the method of determining issues over which the Federal Government had controlling power and the method of determining other justiciable issues between the States as to which this Court as a *quasi*-international tribunal had final power. So far as the issues in the case were subject to national control, the Court intimated that the action, if any, of the Federal Government within its proper constitutional sphere would be treated as of primary importance as governing the national phases of the situation.

> "Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.
>
> "The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the

further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce 'among the several States,' extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. In *United States* v. *Rio Grande Irrigation Company*, 174 U.S. 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

"'Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

"'In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action.'"

See also *Missouri* v. *Illinois*, 200 U.S. 496, 520.

We submit that the quoted reasoning in *Kansas* v. *Colorado* indicates that this Court in the exercise of its

original jurisdiction would give effect to a determination by the appropriate department of the Federal Government of an issue over which Congress had assumed to exercise the powers delegated to it under the Constitution. In the case at bar, therefore, it would follow that the determination by Congress (through its properly created administrative agents in the War Department, see *supra*, pp. 16 to 28) that the proposed Ware and Swift diversions will not obstruct navigation should be regarded in this controversy as conclusive, so far as the issue of the effect of the diversions upon navigation is concerned.

### *C. Only the Navigability Issue is Concluded by the War Department Orders.*

Massachusetts does not contend that this Court has not full jurisdiction to determine what the effect of the proposed diversions will be upon interests other than interests of navigation of the State of Connecticut and its citizens. Congress (and its administrative agents, the Secretary of War and the Chief of Engineers) only have power to determine what the effect of the proposed diversions will be upon navigation.

> See *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 419, and cases cited.

It by no means necessarily follows that a diversion which is innocuous so far as navigation is concerned may not cause damage to other important interests—*e.g.*, health, soil fertility, development of power, etc. We contend, however, that the diversions contemplated will have no adverse effect upon any interest of the State of Connecticut either as a proprietor or as *parens patriae*, or upon the inhabitants of Connecticut. The answer—

(*a*) by denying injury in fact to Connecticut or its inhabitants (see *supra*, pp. 8-9);

(*b*) by alleging that the proposed diversions will in fact constitute a reasonable user by Massachusetts of the waters of the Connecticut river valley (see *supra*, pp. 9-10)—

properly raises issues of fact for this Court to decide; issues which have no national aspect (see *Kansas* v. *Colorado*, 206 U.S. 46, 85) and which are admittedly properly justiciable within the type of cases over which this Court as a *quasi*-international tribunal has final power. See *Kansas* v. *Colorado*, 206 U.S. 46, 95-96 *et seq.* (see *supra*, p. 36). See also *Wisconsin* v. *Illinois*, 278 U.S. 367, 409, and cases cited.

*D. The Certain Benefit in Fact to the Navigability of the Connecticut River as the Result of the Storage of Water in the Swift River Valley (particularly as Modified by the War Department Orders) Strengthens the Necessity of Giving to the War Department Orders Conclusive Effect upon the Issue of Navigability.*

The Commonwealth of Massachusetts will endeavor to prove that the limitations placed upon the diversions, both by the Massachusetts legislation and by the approval granted by the War Department, will cause an increased flow in the Connecticut river during dry seasons, when water is most needed for purposes of navigation (and incidentally for purposes of dilution of sewerage), over and above the flow which would normally occur. This will result from the release of stored waters in excess of the actual flow in the Swift river on a considerable number of days each summer (see Answer, pars. 14, 16, 17, pp. 11, 12, 15, 19; Amended Answer, pars. 2, 3, pp. 9, 10; Appendix "C," esp. at pp. 29-30).

The augmented flow in the Connecticut river thus required by the War Department is a flow which would not occur except for the Massachusetts project. It is a flow furnished, at the expense of Massachusetts, in aid of navi-

gation, in the nature of compensation for a flow taken during flood seasons, which is of no use (and indeed often a positive harm) to navigation and to the riparian owners of Connecticut land.

The action of the War Department in approving the project (with modifications) can thus be said not only to be a waiver of all objection to the project from the standpoint of the Federal interest in the maintenance of navigation, but also to be a positive authorization of a project to some extent of material assistance to navigation. The action of the War Department should thus, because of the determination that the project is to some extent of benefit to navigation, be given conclusive effect here so far as the issue of navigability is raised by the pleadings.

*E. The Allegations both of the Original and of the Amended Answer Deny that Any Injury to Navigation is Caused by the Project. Issues of Fact are thus Raised which are Appropriate for Consideration by a Special Master Appointed by this Court; Provided that this Court should Deem it Proper, Notwithstanding the Action of the War Department, to Consider the Issue of the Effect of the Project upon Navigation.*

Although Massachusetts contends that the finding of the War Department as to the effect of the project upon navigation is conclusive in this case upon that issue, it has none the less denied that the proposed diversion (either as originally contemplated or as limited by the terms of the War Department orders) will in any way adversely affect navigation (Answer, pars. 14, 16, 17, 20, pp. 11, 14-15, 18, 22; Amended Answer, pars. 2-3, pp. 9, 10). In the event that this Court in its discretion should determine that it should not dispose of the issue of navigability upon preliminary motions (such as the present motions of Connecticut raising questions of law solely upon technical admissions of

fact made by motions in the nature of demurrers to the answer), it is submitted that the defendant's answer as amended raises sufficient issues of fact upon the question of navigability to make it proper for this Court to submit the case to a special master for the purpose of obtaining adequate findings of fact in accordance with its usual custom.

See, *e.g.*, *Kansas* v. *Colorado*, 185 U.S. 125, esp. 146-147; 206 U.S. 46, esp. 99-100 *et seq.*
*Wisconsin* v. *Illinois*, 270 U.S. 634; 278 U.S. 367, 370.

## II.

UPON THE ISSUES RAISED BY THE ANSWER, MASSACHUSETTS ALLEGES FACTS WHICH, IF PROVED, CONSTITUTE A FULL AND ADEQUATE DEFENSE TO THE BILL OF COMPLAINT. THE MOTIONS TO DISMISS AND TO STRIKE OUT THE ANSWER SHOULD BE DENIED AND THE CASE SHOULD BE COMMITTED TO A SPECIAL MASTER.

### *A. As a Matter of Law the Facts Alleged in the Answer, if Taken to be True, Constitute a Full Defense to the Bill, and Specific Equitable Relief should be Denied.*

The contentions of Connecticut upon the present motions fall roughly into three groups (see analyses, *supra*, pp. 6 to 8, 12-13):

1. Contentions as to the legality of the proposed diversion so far as concerns the public interest in the maintenance of navigation. These contentions have been answered, *supra*, pp. 16 to 41.

2. Contentions that the proposed diversion, or any similar diversion regardless of its extent, would be illegal as involving an invasion of the sovereign rights of Connecticut under riparian law and under the *quasi*-international law applied in interstate disputes by this Court.

3. Contentions that the facts set up in the answer which tend to show that Connecticut is not damaged and that Boston is facing a severe emergency are immaterial and that such facts cannot properly be considered by this Court even as the basis of equitable defenses.

*1. Under the riparian law in force both in Massachusetts and in Connecticut a riparian owner is entitled to make a reasonable use of the waters flowing past his land, having due regard for the interests of upper and lower riparian owners upon the same stream.*

The general common-law rule as to the rights of riparian owners, as in force in Massachusetts, has been stated as follows:

> "The right of each riparian owner is to have the natural flow of the stream come to his land and to make a reasonable and just use of it as it flows through his land, subject, however, to the like right of each upper proprietor to make a reasonable and just use of the water on its course through his land and subject further to the obligation to lower proprietors to permit the water to pass away from his estate unaffected except by such consequences as follow from reasonable and just use by him."

*Stratton* v. *Mount Hermon Boys' School*, 216 Mass. 83, 85 (see cases cited).

See *Taft* v. *Bridgeton Worsted Co.*, 237 Mass. 385, 388.

*Collins Mfg. Co.* v. *Wickwire Co.*, 14 Fed. (2d) 871, 872.

*Parker* v. *American Woolen Co.*, 195 Mass. 591, 598-599.

*Mason* v. *Whitney*, 193 Mass. 152, 158.

*McNamara* v. *Taft*, 196 Mass. 597, 599.

*Isbell* v. *Greylock Mills*, 231 Mass. 233, 236.
*Parker* v. *Griswold*, 17 Conn. 288, 299.
*Stamford Extract Mfg. Co.* v. *Stamford Rolling Mills Co.*, 101 Conn. 310, 320.
*Buddington* v. *Bradley*, 10 Conn. 212.

What constitutes a reasonable use is purely a question of fact, involving an application of the legal principle above stated to the situation presented before the Court.

*Elliot* v. *Fitchburg R.R.*, 10 Cush. 191, 195.
*Mason* v. *Whitney*, *supra*.
*Parker* v. *American Woolen Co.*, *supra*.
*McNamara* v. *Taft*, *supra*, at p. 599.
*Roach* v. *Sturdy*, 250 Mass. 357, 358-359.
*Hazard Powder Co.* v. *Somersville Mfg. Co.*, 78 Conn. 171.
*Keeney & Wood Mfg. Co.* v. *Union Mfg. Co.*, 39 Conn. 576 (criteria as to reasonable use of water by a mill).
*Water Commrs.* v. *Perry*, 69 Conn. 461, esp. 467.
*Donnelly Brick Co.* v. *New Britain*, 106 Conn. 167; 137 Atl. 745.
*Gillett* v. *Johnson*, 30 Conn. 180.
*Parker* v. *Hotchkiss*, 25 Conn. 321, 330.

It is undisputed, both in Connecticut and Massachusetts, that diversion of water of a stream for use upon riparian property within the same watershed is entirely proper if it constitutes as a matter of fact a reasonable use of the waters of the stream by the riparian owner.

*Stratton* v. *Mount Hermon Boys' School*, *supra*.
*Hittinger Fruit Co.* v. *Cambridge*, 218 Mass. 220 (percolating waters).

*Isbell* v. *Greylock Mills,* 231 Mass. 233 (where relief was denied).

*Keeney & Wood Mfg. Co.* v. *Union Mfg. Co.,* 39 Conn. 576, 582 (where diversion and mill use are compared).

*Gillett* v. *Johnson,* 30 Conn. 180, 183 (diversion of a small stream for purposes of irrigation).

*Parker* v. *Griswold,* 17 Conn. 288, 297 *et seq.*

See *Wier* v. *Covell,* 29 Conn. 197 (where the decision is based in part upon conveyances there involved).

As to a diversion outside the watershed, the Massachusetts cases are clearly to the effect that use of water outside the watershed is proper if in fact the use in the particular case constitutes a reasonable use of the waters of the stream in such a way as to cause no material damage to the interests of lower riparian owners. Unless there is actual or perceptible damage to a lower riparian owner, not even nominal damages will be awarded upon his bringing an action of tort based upon the diversion.

*Elliot* v. *Fitchburg R.R.,* 10 Cush. 191.

*Stratton* v. *Mount Hermon Boys' School,* 216 Mass. 83, 85.

Upon the same principle, specific relief in equity will be denied to a complainant who cannot show that the diversion which he seeks to enjoin has caused actual damage to his right to make a reasonable use of a stream.

*Isbell* v. *Greylock Mills,* 231 Mass. 233, 236.

The Connecticut cases upon the reasonableness of a diversion of water from the watershed by a riparian owner are by no means as clear as the Massachusetts cases. In

most of the decided cases the diversion complained of was in any event an unreasonable use of the water under the particular circumstances involved, so the question decided in Massachusetts in the case of *Stratton* v. *Mount Hermon Boys' School*, 216 Mass. 83, has not been squarely ruled upon in Connecticut, although the privilege of making a diversion to another watershed is not regarded as an ordinary incident of riparian ownership.

See, *e.g.*, *Osborn* v. *Norwalk*, 77 Conn. 663, 664-665.
*Harding* v. *Stamford Water Co.*, 41 Conn. 87, 91 *et seq.*

The Connecticut rule probably differs from the rule established in Massachusetts by the *Stratton* case in one particular. A lower riparian owner seems to be entitled to nominal damages even if the infringement of his riparian interests by a diversion to another watershed is of the most trivial sort possible. However, the courts of Connecticut apparently will not award substantial damages for such a diversion, nor will they enjoin such a diversion unless the complainant has suffered substantial damage because of the diversion. Apparently due weight is given to considerations of comparative damage and to facts constituting a basis for giving substitutional relief by way of damages rather than specific relief in the form of an injunction.

*Watson* v. *New Milford Water Co.*, 71 Conn. 442, 450.
*Cf. Harding* v. *Stamford Water Co.*, 41 Conn. 87, 95.
*Balf Co.* v. *Hartford Electric Light Co.*, 106 Conn. 315.

In the case last cited an injunction was denied upon the condition that compensation be paid to the complainants for the damage caused by the diversion.

In substance, we submit, the rule in Connecticut is fully as liberal with respect to reasonable but permanent diversions from the watershed as that laid down in the *Stratton* case for Massachusetts. That Connecticut permits the diversion of water from the watershed for use as a domestic water supply under state or municipal control is apparent from the cases cited. Due compensation for actual damage caused by the diversion must, of course, be paid.

See also *Beckerle* v. *Danbury*, 80 Conn. 124, 127.

It would seem that the Connecticut courts in a proper case would give due consideration to the amelioration of damage by compensation in kind by augmenting the flow of the diverted stream in dry seasons.

*Harding* v. *Stamford Water Co.*, 41 Conn. 87, 93.

The rule of reasonable user in the light of the circumstances in each particular case also extends to analogous matters, such as pollution.

*Parker* v. *American Woolen Co.*, 195 Mass. 591.
*McNamara* v. *Taft*, 196 Mass. 597.
*Collins Mfg. Co.* v. *Wickwire Co.*, 14 Fed. (2d) 871.
*Merrifield* v. *Lombard*, 13 Allen 16.
*Harris* v. *Mackintosh*, 133 Mass. 228.
*Martin* v. *Gleason*, 139 Mass. 183.
*Nolan* v. *New Britain*, 69 Conn. 668.
*Platt Bros. & Co.* v. *Waterbury*, 72 Conn. 531.
*Lawton* v. *Herrick*, 83 Conn. 417, 425.
*Morgan* v. *Danbury*, 67 Conn. 484.
See *Donnelly Brick Co.* v. *New Britain*, 106 Conn. 167, and cases cited.

See also *Rockport* v. *Elwell*, 219 Mass. 287.
*Ingraham* v. *Dunnell*, 5 Met. 118 (where apparently damages were held to be adequate).
*Brookline* v. *Mackintosh*, 133 Mass. 215.
*Stamford Extract Mfg. Co.* v. *Stamford Rolling Mills Co.*, 101 Conn. 310.
*Rockeville, etc., Co.*, v. *Koelsch*, 90 Conn. 171.
*Cf. DeWitt* v. *Bissell*, 77 Conn. 530.

This examination of the law of riparian rights in force in Massachusetts and in Connecticut has been made because of the fact that this Court, in the exercise of its original jurisdiction of controversies between States, gives some consideration (though far from conclusive weight) to the rules of law which would govern the controversy if it were pending between private parties in the courts of either State.

See *Kansas* v. *Colorado*, 185 U.S. 125, 146-147; 206 U.S. 46, 96 *et seq.*
*Wyoming* v. *Colorado*, 259 U.S. 419, 466.
See *L. Ward Bannister*, "*Interstate Rights in Interstate Streams in the Arid West*," 36 *Harvard Law Review* 960.

There is ample authority to the effect that the local law in force in either State is not conclusive, when this Court is acting in its *quasi*-international capacity.

See, *e.g.*, Mr. Justice *Holmes* in *Missouri* v. *Illinois*, 200 U.S. 496, 519-520:

> "The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law

and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized. *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 737. It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. *But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals.* If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States." (Italics ours.)

So far as the local law of Connecticut and of Massachusetts is here of importance, we submit that it lays down a principle of reasonable user as between riparian owners—a principle of equality of right and opportunity limited only by the obligation not to inflict serious and substantial injury on others equally entitled. It further appears that both States lay some emphasis on the doctrine that specific relief can only be grounded on serious injury to the complainant by the diversion, and even if serious injury appears, serious consideration will be given by the courts to equitable considerations of expediency and comparative damage.

Regarding both States engaged in the present controversy as riparian owners on a large scale, we submit that there are issues of fact adequately raised by the pleadings (particularly the allegations of the answer) as to the reasonableness of the Massachusetts project and as to the trivial nature of the alleged injury (if any) to Connecticut. The existence of these issues of fact forecloses any present disposition of this case upon motions in the nature of demurrers to the answer. The allegations of reasonableness in the Massachusetts answer must, for the purpose of these motions, be taken to be true. Under the local law of both States, we submit that, if it be taken as true that the Massachusetts diversion will be in fact reasonable and that Connecticut will not be appreciably injured by it, not only would Connecticut be barred from specific relief by way of injunction but she would also be barred from more than nominal damages. It is obvious also, if the contemplated use of water by Massachusetts is in fact a reasonable use of the waters of the Connecticut river valley, that Massachusetts under the local law of water rights is taking no property of Connecticut or of its citizens. Thus upon this factual hypothesis no question of the exercise of the right of eminent domain by one State over land in another State is here presented. The case requires findings of fact by a master and the present motions to dismiss and to strike out should be denied.

*2. Upon the allegations of fact contained in the defendant's answer, as amended, under the law applied by this Honorable Court in litigation as between States of the Union, Connecticut would not be entitled to relief in equity.*

It is not disputed by Massachusetts that Connecticut has a standing as *parens patriae* to raise for the determination of this Court issues (other than issues concerning navigability) with respect to the effect of the proposed Massachusetts diversions. This right of the State to sue in behalf of

its own proprietary interests and the general welfare of its people is established by many decisions of this Court.

> *Kansas* v. *Colorado*, 185 U.S. 125, 141 *et seq.*; 206 U.S. 46, 80 *et seq.*
>
> *Missouri* v. *Illinois*, 180 U.S. 208, 241; 200 U.S. 496, 519.
>
> *New York* v. *New Jersey*, 256 U.S. 296, 302.
>
> *North Dakota* v. *Minnesota*, 263 U.S. 365, 372 *et seq.*
>
> *Wisconsin* v. *Illinois*, 278 U.S. 367, 409, and cases cited.

This Court not only has not consistently applied the law of any particular jurisdiction to interstate controversies involving the use of water of interstate streams, but it has studiously avoided tying its hands for the future by more than a determination of the guiding principle applicable to the case before it upon the particular facts actually before it for consideration. The doctrine of the decisions is perhaps best expressed in the language of Mr. Chief Justice *Fuller* in *Kansas* v. *Colorado*, 185 U.S. 125, at pp. 146-147:

> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer."

This Court has recognized that an interstate controversy of this nature "rises . . . above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint" (Mr. Justice *Brewer* in *Kansas* v. *Colorado*, 206 U.S. 46, at 99). In the case last cited the Court goes on, at page 100, to discuss the situation before it as it would be if involving solely individual riparian proprietors. In that case the Court said:

"The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.

"We do not intimate that entirely different considerations obtain in a controversy between two States. Colorado could not be upheld in appropriating the entire flow of the Arkansas River, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between the two States, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory."

This language, together with other language found at pages 96-97 of the same opinion, shows the breadth of view taken by this Court when deciding important interstate disputes, which, in the case of completely independent sovereign States, would be settled either by diplomacy or by resort to war. It is, of course, true that the law of the States involved is given great weight by this Court in such disputes.

See, *e.g.*, *Wyoming* v. *Colorado*, 259 U.S. 419, 458, 464 *et seq.* (see *supra*, p. 47).
*Kansas* v. *Colorado*, 206 U.S. 46, 94.

That the local law is not given conclusive weight is well established.

See, *e.g.*, *Missouri* v. *Illinois*, 200 U.S. 496, 519-522 (quoted in part *supra*, pp. 47-48).

It is clear from the language of the decision in the above case, at page 521, that this Court will examine not only technical rules of law in force in each of the States, but also prevailing practice as to the use of streams in the communities affected by the controversy. See, for example, the following language of Mr. Justice *Holmes*, at pages 521-522:

> "As to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into the river is general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642. See *Boston Ferrule Co.* v. *Hills*, 159 Massachusetts, 147, 150. Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it

that courts should not be curious to apportion the blame."

It is well settled that this Court, in exercising its original jurisdiction between States, requires that the complainant State prove that the injury which is the basis of its proceeding is a real and substantial injury causing serious damage to the complainant. It is generally stated that in order to obtain equitable relief in a suit between two States of the Union far greater damage to the interests of the complainant State must be shown than must be proved by the complainant in the case of a controversy between two private individuals.

*Missouri* v. *Illinois*, 200 U.S. 496, 521.
*New York* v. *New Jersey*, 256 U.S. 296, 309.
*North Dakota* v. *Minnesota*, 263 U.S. 365, 374.

The doctrine of the cases just cited is supplemented by the doctrine that a State will not be entitled to relief in a case brought under the original jurisdiction of this Court unless it can show that a present and substantial interest is affected by the injury complained of.

*New York* v. *Illinois*, 274 U.S. 488, esp. at 490.
*New Jersey* v. *Sargent*, 269 U.S. 328.
*Cf. Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593.

The elastic nature of the law applicable to these interstate water disputes is well indicated by the following language of Mr. Justice *Holmes* in *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U.S. 258, at 261:

"It is conceivable, to be sure, that the decisions of this court may determine that the States have rights as against each other *in invitum* in streams that flow through the land of both. *Kansas* v. *Colorado*, 206

U.S. 46, 84. *Missouri* v. *Illinois*, 200 U.S. 496, 519, 520. These rights may vary according to the system of law required by natural conditions. They may be more or less analogous to common law rights between upper and lower proprietors, where irrigation is not necessary, as in most of the older States. See *New York* v. *Pine*, 185 U.S. 93, 96. There may be some, perhaps limited, right of appropriation in the upper State, at least in the watershed of the stream, where irrigation is the condition of using the land. See *Kansas* v. *Colorado*, 206 U.S. 46, 100-104, 117. But whatever this court may decide, if a private owner should derive advantage from such a decision it would not be in his own right, but by reason of and subordinate to the rights of his State, and those rights, the petitioner insists, can, or at least should be, determined only in a suit brought by the State itself."

It is, of course, true, as indicated in the last sentence of the quotation just above, that this Court will not grant equitable relief to one State against another where the complainant State is suing purely on behalf of its individual inhabitants. The interest sought to be protected by the complainant State must, of course, be an interest so general in its scope that its protection is a duty of the complainant State as *parens patriae*.

See *North Dakota* v. *Minnesota*, 263 U.S. 365, at p. 375 *et seq.*

In a case very similar to the cases which ordinarily come to this Court in the exercise of its original jurisdiction between States, this Court gave great weight to facts which gave a basis for equitable defenses,—in the particular case that of laches,—as a reason for granting substitutional rather than specific relief.

*New York City* v. *Pine*, 185 U.S. 93.

It is submitted that even more attention to any such facts, as for example that the use complained of was for a municipal and domestic water supply, which tended to make substitutional rather than specific relief proper, would be given in a suit by one State against another State than in a case merely involving a controversy between two individuals.

The general principles summarized above applicable to cases brought by one State against another before this Honorable Court are very broad and depend to a large extent upon the facts of each particular case, as viewed in the light of the whole situation in the community in which the controversy arises. This Court has established in the cases involving what might be called interstate riparian ownership a doctrine of equality of right to the economic benefits arising from the presence of an interstate river as a natural resource of two or more States. That equality of benefit is, under the decisions of this Court, to be allocated as among the interested States in due proportion by the application of standards varying with the facts in the particular case.

No case has yet been decided by this Court which involves precisely the situation involved in the case at bar. *Kansas* v. *Colorado* was a suit between two States, one of which had a local riparian law based on a mere modification of the common law of riparian rights. The other State (Colorado) was subject to the western appropriation theory of riparian rights. In that case it was held that Kansas could not complain if a broad and equitable application of the doctrine of reasonable user at the common law were applied in the then pending controversy.

In the case at bar both contestants are subject to the common law of riparian rights with its attendant freedom and elasticity of application based upon the rule of reason in the light of the surrounding circumstances. Clearly, it cannot be said, in the light of the reasoning of the decided cases,

that as a matter of law the facts set up in the answer are insufficient as a defense. The whole controversy is one which by its very nature demands a careful study of the factual situation out of which the controversy arises, and we submit that the pending Connecticut motions seeking to raise pure issues of law upon the basis of technical admissions (by motions in the nature of a demurrer) should be denied, perhaps without prejudice, and that a special master should be appointed by this Court with all the power and authority to inquire into the facts in behalf of the Court that were given to the special master appointed in the still pending litigation between the Great Lakes States and the State of Illinois with respect to the diversion of water from Lake Michigan.

See *Wisconsin* v. *Illinois*, 278 U.S. 367, 370; s.c. 271 U.S. 650.
See also discussion *supra*, pp. 40-41.

*B. As a Matter of Discretion, this Honorable Court should Deny the Motions of Connecticut and should Commit this Case to a Special Master for Findings of Fact.*

We have argued above (*supra*, pp. 41 to 56) that the facts alleged or admitted in the defendant's answer are sufficient as a matter of law to constitute a defense to the Connecticut bill. We submit that we have shown (*supra*, pp. 49 to 56) how much this Court has been accustomed to rest its determination of the principles of law applicable to an interstate water dispute upon the facts revealed by the particular case. The facts not only are the basis for the application of established legal principles by this Court, but to some extent the facts determine the legal principles to be applied and enter into the creation of new rules of law developed for the determination of the pending case alone. It is apparent, therefore, that the definite ascertainment of the facts pertinent to the pending controversy is a

A. Ware river below Point of Diversion.

B. Swift river 1 mile below Point of Diversion.

Note: Of course no diversion has in fact taken place as yet. The project will not take effect at all until 1931 (Answer, par. 19, p. 23).

C. The Connecticut river from slightly below the Massachusetts–Connecticut State line.

D. The Connecticut river looking upstream from the Massachusetts–Connecticut State line.

necessary condition precedent to the determination of the principles of law by which the case is to be decided. Obviously, motions are premature which seek to have allegations of fact in the answer (necessarily general because of the magnitude of the project involved) stricken out and dismissed as inadequate to constitute a defense in law or in equity, when those facts are established as admitted solely in a very technical sense for the purposes of the motions.

It is, of course, necessary that the allegations of the answer as to the reasonableness of the contemplated diversions be couched in general terms. Before these allegations really can mean anything to this Court, sitting as a *quasi*-international tribunal, they must be expanded, explained, analyzed, and tested by some competent trier of the fact who can examine the whole project in the light of the background of local custom and economic practice and as affected by local law and public necessity. Attached hereto (opposite p. 56) are four photographs to serve as a graphic illustration of our argument that as a matter of policy this Court should have all the facts before it before determining any questions of law going to the root of the whole controversy. The two pictures marked "A" and "B" on page A show the Ware river and the Swift river, respectively, at or near the point of diversion. The two pictures marked "C" and "D" on page B show the Connecticut river at or near the point where the river crosses the boundary between Connecticut and Massachusetts. An examination of these pictures immediately brings to mind a large number of questions of fact that this Court would insist on having answered before determining this important cause. How much of the flow shown in the Ware and in the Swift rivers will be taken under the Massachusetts plans? Is this a fairly representative wet or dry season flow? What is the usage of the community through which these streams flow as to diversions? storage? regulation of flow? disposal

of liquid industrial waste? What proportion of the flow shown in the Connecticut river comes from the flow shown in the Ware and Swift rivers? What relation does experience show exists between the flow of the Connecticut river, both at Hartford and at the state boundary, and the flow of the Swift river and the Ware river? How does the change of tide and wind affect that relation? Would any diversion in fact be permitted under the terms of the War Department orders when a condition of stream flow existed as shown in these pictures? All these questions and many more must be answered before the issue of the reasonableness of the Massachusetts project can properly be determined. We do not offer these photographs as having any evidential value. They are submitted purely as a chalk to emphasize our argument that this case involves primarily questions of fact. After those questions have been decided, issues of law will arise. Before those questions are decided, any attempt to dispose of issues of law or of issues of mixed fact and law is premature.

We submit that in the exercise of a sound judicial discretion the Connecticut motions should be denied and the cause committed to a special master.

Respectfully submitted,
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